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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

NO. 752

MILTON FRANK ALLEN PUBLICATIONS, INC.
Petitioner,

vs.

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MACKAY & ELLIOTT
ARNALL, GOLDEN & GREGORY
Of Counsel for Respondent

JAMES A. MACKAY
500 First National Bank Building
Decatur, Georgia

CLEBURNE E. GREGORY, JR.
1000 Fulton Federal Building
Atlanta, Georgia 30303
Counsel for Respondent

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STATEMENT OF THE CASE

The Petitioner's statement omits relevant facts which are necessary to a clear understanding of the case.

Respondent is a non-profit membership corporation (Exhibit D-1; R. 1053). On March 26, 1946, Mr. Milton Frank Allen, who was Secretary and Executive Secretary

of Respondent, presented to Respondent's Board of Directors two contracts which had been prepared in advance by Allen's attorney. (Exhibit P-10; R. 539) The "membership contract," which the trial court and Georgia Supreme Court both held to be void, granted to Mr. Allen the sole and exclusive right to solicit membership for Respondent during a period of thirty years, with the "irrevocable option" in Mr. Allen of renewing the contract for two additional and consecutive periods of thirty years each. Respondent's membership dues were fixed by the contract at not less than $10 per annum. The contract authorized dues to be increased up to, but not exceeding, $25 per annum by a two-thirds majority vote of a quorum present at a regular meeting of Respondent's Board of Directors, provided three months notice in writing had been given to Mr. Allen. For his services in obtaining memberships, Mr. Allen was to receive under the contract three-fourths of the membership dues and of any increase in such dues, plus $1.50 as the subscription fee to the "official organ" which, under the other contract, he obtained the exclusive right to publish during the same 90-year period. (Exhibit P-1; R. 497)

At the same meeting of the Board of Directors, but before the contracts were presented to the Board, it amended Article III, Section 5, Subsection (f) of the by-laws by adding a new subsection 7 as follows:

> "The Board of Directors is authorized to make and enter into a binding contract for the Georgia Association of Petroleum Retailers, Inc. (a) for the solicitation of memberships in said Association, (b) for the adoption of a publication which shall be the exclusive official organ of said association, and (c) providing for the deduction for said services out of the dues paid into the Association from time to time by its members. The Board acting through its President and Treasurer shall be authorized to do and

perform each and every other act in connection therewith which may, in law, be necessary to fully enter into said agreement and carry out or perform the objects of the corporation in connection therewith." (Exhibit P-10; R. 539)

The contracts were approved at a meeting of the Board of Directors held on April 11, 1946, as originally submitted by Mr. Allen. (Exhibit P-4; R. 510)

Neither the contracts nor the by-laws were submitted to or approved by the membership of the Association. (Exhibit P-10, R. 395, 403-405, 412, 413)

Membership dues are the principal source of income of a trade association and were practically the sole source of income of the Respondent. (R. 375-378, 397, 417, 418)

Mr. Allen assigned the contracts to petitioner, a corporation created by him of which he was President and sole stockholder. (R. 178)

REASONS FOR NOT GRANTING THE WRIT

(1) THE FEDERAL CLAIM WAS NOT TIMELY RAISED

The Federal claim which the Petitioner now seeks to raise did not appear in the case until after the first motion for rehearing in the Georgia Supreme Court had been denied. The rules of that Court provide that no motion for rehearing by the same party after a first motion has been denied will be filed except by special order of the Court, although the clerk may receive any such later motion and deliver the same to the Court for action. (Petitioner's Brief, Appendix B, p. 29) There was no order by the Court authorizing the filing of the second motion in this case. The application by the Petitioner for permission to file a second motion for rehearing was not granted. The second motion for rehearing was

never filed and the Federal claim was never decided by any State court.

The Federal claim was not raised at the first opportunity. Respondent's cross-action alleged that the membership contract was void because it divested the Board of Directors of authority to operate the business affairs of the corporation. (Cross-action, Para. 57, 58, 59) This contention was founded upon the Georgia law which gave the Board of Directors control of the corporation, and which was stated in the statute cited by the Georgia Supreme Court. The statute, including the exceptions or limitations embodied in the statute, should have been known to the Petitioner from the inception of the issue which was made by the original pleadings in the trial court. If the Federal claim constitutes a defense to the cross-action, it did so when the cross-action was filed. The fact that the Georgia Supreme Court cited the Georgia statute announcing the rule upon which the cross-action was based should not have been a surprise to Petitioner at any time. The Federal claim was not even raised in the first motion for rehearing which was filed after the decision by the Georgia Supreme Court which cited the statute. It was not seasonably presented when it was raised for the first time on the second motion for rehearing which, under the rules of the Georgia Supreme Court, was never filed or considered by that Court.

Bloeth v. New York
82 S. Ct. 661, 7 L. ed 2d 780

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120, 128, 65 S.Ct. 1475,
89 L. ed. 2092

Herndon v. Georgia,
295 U.S. 441, 443,
55 S. Ct. 794, 79 L. ed. 1530

(2) THERE IS NO FEDERAL CLAIM OF SUBSTANCE

The effect of the contract between Respondent and its Secretary, which had a possible term of 90 years at the option of the Secretary, was to surrender the right of the non-profit Association to solicit its own membership; to prevent the Association from reducing its membership dues below $10 per annum; to prevent the Association from increasing its membership dues above $25 per annum; to prevent the Association from increasing such dues within that range except by a two-thirds majority of a quorum present at a regular meeting of the Board of Directors, provided three months advance written notice were given to Mr. Allen; to prevent the Association from reducing its dues after they had been increased; and to take from the non-profit Association 75% of its principal and most available source of income for the private gain of an individual.

The trial court and the Georgia Supreme Court correctly held that the membership contract was void because it divested the Directors of the Association of authority and duties imposed upon them in the government and management of the corporation.

The Petitioner asserts that this statutory right of the Directors is subject to the limitation of the "by-law" authorizing the contract. The "by-law" upon which the Petitioner relies did not constitute such a limitation and cannot save the contract.

The action by the Board of Directors in authorizing a contract was more in the nature of a resolution than a by-law. A by-law is a permanent rule of action, in accordance with which the corporate affairs are to be conducted. A by-law differs from a resolution in that a resolution applies to a single act of the corporation, while a by-law

is a permanent and continuing rule which is to be applied on all future occasions.

Hornady et al v. Goodman et al
167 Ga. 555, 573, 146 S.E. 173

Even if considered as a "by-law," the action by the Board of Directors did not authorize an invalid contract. Contrary to the statement of the case by Petitioner (Petition for Certiorari, p. 10) the by-law was not adopted concurrently with the execution of the contract. The by-law was adopted at a meeting of the Board of Directors on March 26, 1946, before any specific contract had been submitted to the Board (Exhibit P-10; R. 539). The membership contract was approved by the Board at a meeting held on April 11, 1946, (Exhibit P-4; R. 510) although the contract was dated back to March 26, 1946 (Exhibit P-1; R. 497).

The by-law was not a "limitation" on the statutory authority of the Board of Directors to have full control over the affairs of the corporation. It did not refer to any specific contract. It did not expressly authorize the exclusion of the Association from the solicitation of its own membership. It did not authorize a minimum and maximum limit on dues, nor a requirement that dues be increased only by a two-thirds vote of the Board of Directors, nor an agreement that dues never be decreased after having once been increased. It did not authorize divesting the Association of the larger part of its principal asset and source of income for a period of 90 years. It simply authorized the Board to enter into a binding contract "for the solicitation of membership in said Association" and "providing for the deduction for said services out of the dues paid into the Association from time to time by its members." Thus, the plain language of the by-law did not limit the authority of the Board of

Directors to exercise full control over the affairs of the corporation.

By-laws of a corporation are construed according to the principles of the law of contracts.

Gwin v. Thunderbird Motor Hotels, Inc.
216 Ga. 652, 658, 119 S. E. 2d 14

By-laws, like contracts, are to be construed reasonably, and if they are susceptible of two reasonable constructions, one of which would make them invalid, they should be construed in accordance with the view sustaining their validity.

18 *Am. Jur.* 2d 699,
Corporations, Para. 168;

Ga. Code Ann. § 20-704(4);

Slater v. Savannah Sugar Refining Corp.,
28 Ga. App. 280, 110 S.E. 759.

If the by-law were construed to authorize the particular membership contract and, thus, as a limitation on the Board of Directors, the action of the Board in adopting the by-law would itself be invalid. Membership and dues were essential to the existence of the Association. The contract disposed of the Association's right to solicit membership, of its right to fix membership dues except within narrowly restricted limits, and of three-fourth of all membership dues collected. A board of directors has no authority to dispose of property essential to the corporate business except when and as authorized by the affirmative vote of stockholders of record entitled to exercise at least a majority of the voting power on such a proposal at a stockholder's meeting called for that purpose.

Georgia Laws 1937-38,
Ex. Sess. pp. 214, 241;
Georgia Code Ann. § 22-1870.

The same statute is applicable to corporations not organized for pecuniary gain or profit and without capital stock.

Georgia Laws, 1937-38,
Ex. Sess. pp. 214, 245,
as amended by *Georgia Laws* 1949, pp. 950, 953
Ga. Code Ann. § 22-1881.

Although the State Courts have not had occasion to apply that section of the statute requiring a majority vote of the stockholders to dispose of essential corporate property to the dosposition of such assets by a non-profit membership corporation, in the absence of such applicability the common law rule would apply which is that a majority of the members have the right to devote the funds of the association to any purpose calculated to promote the objects of the association but have no right to apply them to other uses without unanimous consent.

Myrick v. Holmes,
151 Ga. 437, 107 S.E. 324;

Chatfield v. Denington,
206 Ga. 762, 58 S.E. 2d 842

By-laws which infringe the common or statute law of the State are void.

Haywood v. The Mayor and Aldermen of Savannah, 12 Ga. 404, 409;

Hornady v. Goodman,
167 Ga. 555, 572, 146 S.E. 173

A corporation cannot so amend its by-laws as to make an altogether new and different kind of society.

Shiflett v. John W. Kelly & Co.,
16 Ga. App. 91, 84 S.E. 606.

Thus, a non-profit corporation could not, by an amendment to its by-laws, devote its principal income and sources of income to an individual's private gain.

Morton v. Savannah Hospital,
148 Ga. 438, 96 S.E. 887

One Board of Directors did not have the authority to bind all subsequent boards of directors by irrepealable by-laws. The power to adopt a by-law is the power to repeal and a by-law may itself be altered, amended, or repealed by the same power which enacted it.

Hornady et al v. Goodman et al,
167 Ga. 555, 574, 146 S.E. 173;

Crittenden v. So. Home Building & Loan Assoc.,
111 Ga. 266, 271, 36 S.E. 643.

Thus, the by-law adopted by one board of directors, cannot be construed as a limitation on the right of subsequent boards to control the corporate affairs.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MACKAY & ELLIOTT	JAMES A. MACKAY
ARNALL, GOLDEN & GGEGORY	CLEBURNE E. GREGORY, JR.
Of Counsel for Respondent	*Counsel for Respondent*

CERTIFICATE

Copies mailed to opposing Counsel as per Certificate of Service on file.